20-CA-24071-001-0

PETROCHEM INSULATION, INC.

Activity Date (yyyy/mm/dd)	Activity Comment
2003/01/23	Rec'd ltr signed Lawrence Marquess (Littler), to Asst. Reg. Dir., dated 1.17.03, RE:need for additional 21 days to file answer
2003/01/22	Rec'd "Employer's Unopposed Motion for Extension of Time for Filing Answer to Specification", signed by Rebecca Gibson (Littler/Mendelson), filed on 1.15.03. (JR)
2002/04/24	TWO FORMAL FILES, ONE INFORMAL FILE, EXTRA
2002/04/24	(CONT) PAPERS AND FOUR EXHIBITS TAKEN TO CASE RECORDS. (LR)
2001/11/28	REC'D BY FAX ORDER DATED 10.29.01 ADVISINGTHAT THE PETITION FOR WRIT OF CERTIORARI WAS DENIED. (LR)
2001/08/13	REC'D CC LETTER FROM PETER D. NUSSBAUM DATED 8.9.01 REQUESTING AN EXTENSION OF TIME UNTIL 9.17.01 IN WHICH TO FILE RESPONSE TOTHE PETITION FOR A WRIT OF CERTIORARI. (L
2001/07/30	REC'D LETTER FROM (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) DATED
2001/07/30	(CONT) 7.25.01 ENCLOSING COPY OF NOTICE THAT A PETITION FOR WRIT OF CERTIORARI WASFILED IN THE SUPREME COURT ON 7.16.01 AND PLACED ON THE DOCKET 7.17.01 NO. 01-92.(LR
2001/07/18	REC'D NINE PRINTED COPIES OF PETITION FOR A WRIT OF CERTIORARI FROM COUNSEL OF RECORD LAWRENCE W. MARQUESS. TAKEN TO MOTON.(L
2001/07/16	THE COMPANY'S PETITION FOR WRIT OF CERT. WAS FILED IN THE SUPREME COURT. (LR)
2001/05/02	REC'D CERTIFIED COPY OF MANDATE ISSUED 5.101. CERTIFIED COPY TO C.O., ARMSTRONG, SHINNERS AND FILES. (LR)
2001/04/18	REC'D ORDER FILED 4.16.2001 DENYING THE PETITION FOR REHEARING EN BANC. COPY TO BE CIRCULATED. (LR)
2001/04/10	LETTER TO THE CLERK CITING THE SIXTH CIRCUIT'S RECENT DECISION IN BE&K CONSTRUCTION CO. V. NLRB, F.3d 2001 WL 336942 (APRIL9, 2001). ENCLOSED COPY FOR DISTRIBUTING TO THE JUDGES IN ACTIVE SERVICE. (LR)

2001/03/26	REC'D THREE TYPED COPIES OF PETITION FOR REHERING EN BANC FROM COUNSEL FOR PETITIONER LAWRENCE W. MARQUESS DATED 3.23.01. (LR
2001/03/13	REC'D ORDER FILED 3.9.01 GRANTING PETITIONER'S MOTION FOR EXTENSION UNTIL 3.26.01 INWHICH TO FILE PETITION FOR REHEARING EN BANC. (LR)
2001/03/12	REC'D LETTER FROM (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) DATED 3.9.01 ADVISING THAT THE COURT GRANTED PETITIONER'S MOTION FOR EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR REHEARING
2001/03/09	REC'D CC LETTER FORM LAWRENCE W. MARQUESS DATED 3.5.01 ADVISING THAT HE HAS LEFT THELAW FIRM OF OTTEN, JOHNSON, ROBINSON, NEFF& RAGONETTI, P.C., AND EFFECTIVE 1.29.01, BECAME A SHAREHOLDER IN THE FIRM OF LITTLER MENDELSON, P.C.. REQUEST THAT ALL COMMUNICATIONS BE ADDRESSED TO HIM AT THE ADDRESS, NOTED IN THE LETTER. (LR)
2001/03/06	REC'D 3CC OF PETITIONER'S UNOPPOSED MOTIONFOR EXTENSION OF TIME WITHIN WHICH TO FILEA PETITION FOE REHEARING EN BANC, DATED 3/5/01. (LM)
2001/01/31	REC'D ORDER FILED 1.26.01 ON THE COURT'S OWN MOTION, THE CLERK DIRECTED TO WITHHOLDISSUANCE OF THE MANDATE UNTIL SEVEN DAYS AFTER DISPOSITION OF ANY TIMELY PETITION FOR REHEARING OR PETITION FOR REHEARING ENBANC. (LR)
2000/12/05	REC'D ORDER FILED 12.1.00 GRANTING INTERVENOR'S MOTION TO STRIKE. (LR)
2000/11/21	REC'D ORDER FILED 11.17.2000, DENYING AS MOOT, INTERVENORS' MOTION FOR LEAVE TO SHARE TIME WITH RESPONDENT. (LR)
2000/11/07	REC'D ORDER FILED 11.2.2000 ALLOTTING THE FOLLOWING TIMES FOR ORAL ARGUMENT OF THIS CASE SCHEDULED FOR 11.13.2000: PETITIONER 15 MINUTES; RESPONDENT 15 MINUTES. RESPONDENT MAY CEDE A PORTION OF ARGUMENT TIME TO INTERVENOR. THE PANEL CONSIDERING CASEWILL CONSIST OF CHIEF JUDGE EDWARDS AND
2000/11/07	(CONT) JUDGES WILLIAMS AND TATEL. ENCLOSED FORM 72 TO BE COMPLETED AND RETURNED TOTHE CLERK'S OFFICE ON OR BEFORE 11.8.00.(L

2000/11/07	NOTIFICATION THAT LOFASO WILL ARGUE CASE FAXED TO COURT, (b) (6), (b) (7)(C) (LR)
2000/11/07	REC'D COPY OF UA LOCALS 62, 159, 228, ET AL'S "UNOPPOSED" MOTION FOR LEAVE TO SHARE TIME WITH RESPONDENT. PROOF OF SERVICE DATED 11.3.2000 SIGNED BY (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) (LR)
2000/10/31	REC'D COPY OF RESPONSE OF PETROCHEM INSULATION, INC. TO INTERVENORS' MOTION TO STRIKE OR, IN THE ALTERNATIVE, TO RESPOND TO REPLY BRIEF. CERTIFICATE OF SERVICE DATED 10.27.2000 SIGNED BY (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) (L
2000/10/23	REC'D COPY OF UNITED ASSOCITION OF JOURNEYMEN, ETC. LOCALS 62, 159,228, ET AL'S MOTION TO STRIKE OR, IN THE ALTERNATIVE, TO RESPOND TO PETITIONER PETROCHEM INSULATION, INC.'S REPLY BRIEF. MOTION DATED 10.16.00SIGNED BY PETER D. NUSSBAUM WITH ATTACHED EXHIBIT A. (LR)
2000/10/10	REC'D CC LETTER FROM PETER D. NUSSBAUM, INTERVENOR'S COUNSEL DATED 10.4.2000 CITING WHITE V. LEE, NOS. 99-15098, 99-15109, 99-16033, 2000 U.S. APP. LEXIS 23778 AT *59 (9TH CIR. SEPT. 27, 2000). ALSO NOTIFYINGTHE COURT THAT THE SUPREME COURT DENIED
2000/10/10	(CONT) THE PETITION FOR WRIT OF CERTIORARIIN CARDTOONS V. MAJOR LEAGUE BASEBALL PLAYERS, 208 F.3d 885 (10TH CIR. 2000)(EN BANC), CERT. DENIED, NO. 00-39, 2000 U.S. LEXIS 5683 (OCT. 2, 2000). (LR)
2000/09/18	REC'D THREE PRINTED COPIES OF APPELLANT'S REPLY BRIEF. (LR)
2000/07/03	REC'D THREE PRINTED VOLUMES EACH OF JOINT APPENDIX VOLUMES I, II, & III FROM COUNSELFOR PETITIONER. (LR)
2000/04/03	REC'D ORDER FILED 3.30.2000 ADVISING THAT THIS CASE HAS BEEN SCHEDULED FOR ORAL ARGUMENT ON MONDAY, NOVEMBER 13, 2000 AT 9:30 AM BEFORE CHIEF JUDGE EDWARDS AND CIRCUIT JUDGES WILLIAMS AND TATEL. BRIEFING SCHEDULE IS AS FOLLOWS: PETITIONER'S BRIEF AND APPENDIX DUE JUN 30, 2000; AMICUS FOR PETITIONER'S BRIEF DUE JULY 17, 2000; RESPONDENT'S BRIEF DUE AUG 16, 2000; INTERVENOR FOR RESPONDENT'S BRIEF DUE AUG 31, 2000; PET
2000/04/03	(CONT)ITIONER'S REPLY BRIEF DUE 9.14.20.(L

2000/03/13	REC'D ORDER FILED 3.10.2000 DENYING THE MOTION TO TRANSFER CASE TO THE NINTH CIRCUIT
2000/03/09	REC'D ORDER FILED 3.7.2000 GRANTING THE MOTION FOR LEAVE TO FILE AN ADDENDUM TO THE REPLY. (LR)
2000/03/06	REC'D COPY OF PETITIONER'S RESPONSE TO RESPONDENT'S CROSS-APPLICATION FOR ENFORCEMENT. RESPONSE DATED 3.1.2000 SIGNED BY LAWRENCE W. MARQUESS. (LR)
2000/02/24	REC'D NOTICE FROM THE DEPUTY CLERK ADVISING THAT THE CROSS-APPLICATION FOR ENFORCEMENT WAS FILED ON 2.18.2000. (LR)
2000/02/23	REC'D CC LETTER FROM HEATHER L. MACDOUGALLDATED 2.17.2000 ENCLOSING COPY OF NOTICE OF LPA, INC. AND ASSOCIATED BUILDERS AND CONTRACTORS, INC. OF CONSENT TO PARTICIPATE AS AMICI CURIAE IN SUPPORT OF PETITIONERCOPY OF RULE 26.1 CORPORATE DISCLOSURE STATEMENT OF AMICI CURIAE ALONG WITH COPY OF ENTRY OF APPEARANCE OF HEATHER L. MACDOUGA
2000/02/23	(CONT) ALL, CERTIFICATE OF SERVICE DATED 2.17.2000. (LR)
2000/02/17	APPEARANCE FORM FOR HABENSTREIT MAILED. (L
2000/02/10	APPEARANCE FORM FOR LOFASO MAILED. (LR)
2000/02/10	TRANSFERRED CASE FILE AND RELATED MATERIALTO (ANNE LOFASO) ALSO, HAND DELIVERED CASETO DC COURT. (ATG)
2000/02/09	APPEARANCE FORM FOR ARMSTRONG MAILED. (LR
2000/02/08	REC'D ORDER FILED 2.3.2000 GRANTING THE MOTION FOR LEAVE TO INTERVENE FILED BY UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING IND. (L
2000/02/03	REC'D COPY OF MOTION FOR LEAVE TO FILE ADD
2000/02/03	(CONT) ENDUM TO UA LOCALS 62, 159, 228, 246, 342, ETC. REPLY TO PETITIONER'S OPPOSITION TO MOTION TO TRANSFER CASE TO THE 9TH CIRCUIT ALONG WITH COPY OF ADDENDUM TO THEREPLY, ETC. DATED 1.28.2000 AND SIGNED BY PETER D. NUSSBAUM. (LR)

2000/02/01	REC'D COPY OF DOCKETING STATEMENT, COPY OFSTATEMENT REGARDING DEFERRED APPENDIX, COPY OF SUBMISSION OF UNDERLYING DECISION, COPY OF STATMENT OF ISSUES, COPY OF CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES, CERTIFICATE OF SERVICE DATED 1.25.2000SIGNED BY (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) . (LR)
2000/01/31	REC'D UA LOCALS 62, 159, 228, 246, 343,ETC
2000/01/31	(CONT) REPLY TO PETITIONER'S OPPOSITION TOMOTION TO TRANSFER CASE TO THE NINTH CIRCUIT. REPLY DATED 1.26.2000 SIGNED BY PETERD. NUSSBAUM. (LR)
2000/01/24	REC'D COPY OF PETITIONER'S RESPONSE IN OPPOSITION TO MOTION TO TRANSFER THIS CASE TOTHE NINTH CIRCUIT. OPPOSITION DATED 1.192000 SIGNED FOR LAWRENCE W. MARQUESS. (LR
2000/01/11	REC'D COPY OF DECLARATION OF PETER D.
2000/01/11	(CONT) NUSSBAUM IN SUPPORT OF UA LOCALS 62159, 228, 246, 342, 343, 350, 393, 442, 447, 467 AND 483'S MOTION TO TRANSFER CASE TO THE 9TH CIRCUIT, ALONG WITH COPY OF THEMOTION TO TRANSFER CASE TO THE NINTH CIRCUIT COURT. CERTIFICATE OF SERVICE DATED 1.7.2000 SIGNED BY (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) L
2000/01/07	REC'D COPY OF MOTION FOR LEAVE TO INTERVENE FROM UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY, ETC. LOCALS 62, 159, 228,ETCCERTIFICATE OF SERVICE SIGNED BY (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) COPY TO (b) (6), (b) (7)(C) LR
2000/01/06	REC'D THE ORIGINAL OF PETITION FOR REVIEW FILED 12.20.99 NO. 99-1530 ALONG WITH ORDER FILED 12.27.99 DIRECTING PETITIONER TO SUBMIT THE FOLLOWING BY 1.26.00: DOCKETINGSTATEMENT; STATEMENT OF ISSUES TO BE RAISED; CERTIFICATE OF COUNSEL; TWO COPIES OF THE UNDERLYING DECISION; STATEMENT AS TO WHETHER OR NOT A DEFERRED APPENDIX WILL BEUTILIZED; ETC. FURTHER ORDERED THAT RESPONDENT SHALL SUBMIT THE FOLLOWING BY 2.10. 00: ENTRY OF APPEARANCE FORM; CERTIFIED INDEX TO RECORD; DISPOSITIVE MOTIONS, IF ANY

2000/01/06	(CONT) ORIGINAL AND FOUR COPIES OF PROCEDURAL MOTIONS WHICH WOULD AFFECT THE CALENDARING OF CASE DUE BY 1.26.00. BRIEFING IS DEFERRED PENDING FURTHER ORDER OF THE COURT. COPY OF ORDER TO (b) (6), (b) (7)(C) (LR)

November 27, 1992

Robert H. Miller, Regional Director
Region 20

Robert E. Allen, Associate General Counsel
Division of Advice

Chron

Petrochem Insulation, Inc.
Case 20-CA-24071

Bill Johnson's

133-7200
133-9300
512-5009-6733
512-5009-6767

This Bill Johnson's[1] case was submitted for advice as to whether the Region should continue to hold the instant charge in abeyance pending final resolution of the Employer's RICO and Sherman Act lawsuit against the Union.

FACTS

The Employer, a non-union subcontractor, installs insulation used on construction of cogeneration and alternative fuel power plants in northern California. On December 20, 1990, the Employer filed a RICO lawsuit against the Plumbers District Council 51 and its constituent locals (collectively referred to as "Unions") alleging, inter alia, that the Unions had threatened to, and did, petition, object at, and delay public environmental and land use permit hearings without regard to the merit of their objections, to coerce various developers to enter into hot cargo agreements to use only construction contractors and subcontractors which are signatory to Union collective-bargaining agreements; that these agreements violate Section 8(e) of the Act; that such conduct constitutes criminal extortion under state law and the federal Hobbs Act; and that the criminal extortion constitutes the predicate acts for the criminal liability of the Unions under RICO. In addition, the complaint alleged that the Unions' conduct adversely affected the Employer on four specific projects on which the Employer was invited to bid, but was later told that

[1] Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731 (1983).

only union contractors could work on them. The complaint sought, inter alia, triple damages and attorneys fees.

The court granted the Unions' 12(b)(6) motion to dismiss the complaint because all three RICO claims were preempted by the NLRA. Thus, the Employer's only theory of the RICO predicate acts (criminal extortion) was that "the defendants' tactics were 'wrongful' because their objective was to gain property, hot cargo agreements, to which they were not rightfully entitled because they violated the NLRA."[2] Since the Employer's RICO claims were predicated wholly upon violations of labor laws other than 29 U.S.C. Section 186, they were preempted by the NLRA.[3] However, the complaint was dismissed without prejudice, because it was possible, on the alleged facts, that the Employer could allege and proceed on antitrust claims and RICO claims not based on extortion.

On September 3, 1991, subsequent to the court's denial of its motion for reconsideration and to file a first amended complaint, the Employer filed a second amended complaint alleging that the Unions abused certain administrative permit granting processes by making baseless environmental objections in order to force project owners to boycott non-union contractors in violation of the Sherman Act and RICO. The antitrust violations were based on the Unions' alleged conspiracy and combination with construction project owners to enter into unlawful hot cargo agreements, which precluded the Employer from either bidding for or competing for work on large industrial construction projects in restraint of trade, and on the Unions' alleged monopolization of the insulation subcontracting market. The three RICO causes of action were premised on certain contractual union dues checkoff provisions, the money from which allegedly financed the Bidder Information and Directory Service (BIDS)[4] and is not spent on representational or organizational activities. This complaint also alleged

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[2] Petrochem Insulation v. Trades Council, 137 LRRM 2194, 2197 (N.D. Cal. 1991), citing Butchers' Union Local No. 498 v. SDC Invest., Inc., 631 F. Supp 1001, 1006, 1009 (E.D. Cal. 1986).

[3] "The inclusion of [29 U.S.C.] Section 186 violations as [RICO] predicate acts suggests that Congress was being selective as to what activities were being removed from the ambit of the labor law." 137 LRRM at 2198, and cases cited.

[4] BIDS allegedly provides information to the Unions and Union contractors on upcoming construction projects.

that the Employer would have received the subcontract on four projects except that the Unions threatened to file the type of sham petitions described above unless the project developers or general contractors agreed that only Union subcontractors would be used. In addition, the Employer alleged that the Unions publicized their policy of filing sham petitions and indicated to developers and owners that their construction projects would be delayed to the point of economic infeasibility, if the Unions filed permit objections, unless the work on the projects was limited to union contractors.

On March 19, 1992, the court dismissed the second amended complaint with prejudice.[5] In its decision, the court found that the predicate acts underlying the Employer's RICO claims (i.e., the funding of BIDS through employee dues checkoff provisions) does not violate 29 U.S.C. Section 186, which specifically allows in subsection 186(c)(4) for employee dues to be transmitted by employers.[6] The court also rejected the Employer's Beck[7] argument regarding the legitimate uses to which the service fees of non-members may be put because only dues from union members were involved in the case before the court.[8] Additionally, the court found that the Employer lacked standing to assert the RICO claims because it neither transmitted any of the funds at issue nor alleged that the asserted violation resulted in any loss to the Employer.[9]

The court then dismissed the first antitrust cause of action for conspiracy and combination in restraint of trade because the complaint did not contain the requisite identification of the parties to and contents of any contract, combination, or conspiracy involving the four projects on which the Employer claimed it was unable to bid.[10] Additionally, the court found that the Employer did not plead the requisite injury to competition.[11] The court dismissed the second antitrust cause of action for

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[5] Petrochem Insulation v. Trades Council, 139 LRRM 2956 (N.D. Cal. 1992).

[6] 139 LRRM at 2959.

[7] Communications Workers of America v. Beck, 487 U.S. 735 (1988).

[8] 139 LRRM at 2959.

[9] 139 LRRM at 2960.

[10] 139 LRRM at 2961-2962.

[11] 139 LRRM at 2962.

monopolization of the market because it was legally impossible for labor unions to monopolize the pipe and insulation subcontracting market. Thus, the Unions are not involved in that market but in the labor market, and the Employer failed to allege that the Unions conspired to monopolize the pipe and insulation subcontracting market with a participant within that market (i.e., a union pipe or insulation contractor).[12] Additionally, the court found that the Employer failed to plead the requisite involvement of non-labor groups in the allegedly sham petitioning to defeat the statutory exemption of labor unions from antitrust violations when unions act in their self interest and do not combine with non-labor groups. Moreover, the court found that the Employer failed to plead that the Unions threatened to pursue, or pursued, any meritless objection to any construction project, and failed to identify any such objection or to allege why any specific objection lacked merit. The district court concluded that, without more, there was "simply nothing remotely improper about filing environmental or other objections."[13]

On April 9, 1992, the Employer filed its notice of appeal to the dismissal of the original complaint, the denial of its motion for reconsideration and leave to file a first amended complaint, and the dismissal of the second amended complaint. Opening briefs have been filed with the Ninth Circuit and the Employer will be filing a reply brief.

ACTION

We conclude that the maintenance on appeal of the original RICO complaint is arguably preempted, but that the RICO and antitrust allegations of the second amended complaint are not preempted. However, for the reasons set forth below, we conclude that it would not effectuate the purposes and policies of the Act to issue a Section 8(a)(1) complaint regarding any of the allegations in the Employer's lawsuit based either on preemption or on Bill Johnson's.

I. Preemption

[12] 139 LRRM at 2964.

[13] 139 LRRM at 2966.

In Bill Johnson's Restaurants v. NLRB, supra, the Court first observed that the allegedly unlawful lawsuit was not one which was either preempted or had an "objective that is illegal under federal law."[14] Consequently, the first issue that must be addressed is whether the causes of action asserted in the Employer's lawsuit are preempted by the Act. Under Loehmann's Plaza, the Board held that where activity is arguably subject to the Act, preemption does not occur until a complaint is issued by the General Counsel. Moreover, "if a preempted state court lawsuit is aimed at enjoining . . . Section 7 activity, it is clear that . . . the lawsuit is unlawful under Section 8(a)(1)." The Board further ruled that the legality of preempted causes of action should be evaluated under Bill Johnson's standards for the time that the action is maintained prior to the issuance of the complaint.[15]

Under San Diego Building Trades Council v. Garmon, 359 U.S. 236, 244-45 (1959), when "it is clear or may fairly be assumed that the activities are protected by Section 7 . . . or [prohibited] by Section 8," or even "arguably subject" to those sections, the state and federal courts are ousted of jurisdiction, and "must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." However, the Court set out two exceptions to the preemption of state regulation of conduct that is prohibited as unfair labor practices: (1) activity of merely peripheral concern to the NLRA; and (2) conduct that touches "interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the states of the power to act." 359 U.S. at 243-244. [Footnote omitted.]

A. RICO Allegations

The Employer's first complaint alleges that the Unions engaged in criminal extortion because they sought to obtain property, i.e. "hot cargo agreements", to which they were not legally entitled. Courts have consistently

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[14] 461 U.S. at 737, fn. 5; Loehmann's Plaza, 305 NLRB No. 81, slip op. at 7 (November 21, 1991).

[15] 305 NLRB No. 81, slip op. at 9.

held that where alleged RICO predicate acts solely consist of unfair labor practices or of violations of generic statutes based on unfair labor practices, the RICO causes of action are preempted by the NLRA.[16] On the other hand, where a RICO mail fraud allegation is based on "schemes to deprive an individual of economic benefits that are contained in a collective bargaining agreement", the conduct arguably is subject to federal court jurisdiction under RICO, since the NLRB already shares concurrent jurisdiction with federal courts over breaches of collective-bargaining contracts under Section 301. [17] Applying this precedent, we conclude that the Employer's criminal extortion claim is preempted as it is entirely dependent upon the illegality of those agreements under the NLRA, and states no cognizable ground for finding the alleged agreements unlawful under any other statute or law.[18] However, the same is not true of the RICO allegations made in the second amended complaint. There, the Employer attacks the lawfulness of financing the BIDS program by union dues collected pursuant to a checkoff provision. Although the Employer raises certain Beck arguments to support its position, the claim itself is an alleged violation of 29 U.S.C. Section 186 and, when Congress enacted RICO, it specifically listed violations of that section as predicate acts. See 18 U.S.C. Section 1961(1)(C). We note that while the District Court found the Employer's argument regarding the checkoff authorizations to be without merit because it fell within the Section 186(c)(4) "union dues" exception, and while it may be baseless, it cannot be said to be preempted by the NLRA.

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[16] See Butchers' Union Local No. 498 v. SDC Invest., Inc., supra (RICO violation predicated upon mail fraud held to be preempted by NLRA because the mail fraud violation relied entirely upon conduct which had as its goal the restraint of employees' Section 7 organizational rights); U.S. v. Boffa, 688 F.2d 919, 928-930 (3d Cir. 1982) (RICO mail fraud allegation based on alter ego scheme that deprived employees of their Section 7 rights preempted since it was entirely dependent upon the application of the Act).

[17] See U.S. v. Boffa, supra, at 930.

[18] We recognize that if the Employer had alleged a violation of Section 303 as the basis of its extortion claim, the RICO allegation may not have been preempted because the NLRB already shares concurrent jurisdiction with the federal courts over Section 8(b)(4) violations. See Billy Jack for Her, Inc. v. Ladies Garment Workers, 511 F.Supp. 1180, 1191-1193 (S.D.N.Y. 1981). However, the district court gave the Employer two chances to allege a non-preempted RICO cause of action, and the Employer did not make a Section 303 allegation.

B. Antitrust Allegations

The Employer's second amended complaint alleges an unlawful antitrust conspiracy with regard to the same hot cargo agreements at issue in the first RICO complaint. However, the gravamen of the antitrust allegations is that the entire pattern of conduct in which the Unions engaged resulted in a competitive injury to the Employer, specifically the loss of opportunity to bid on four projects. Therefore, although the legality of the agreements themselves may require an analysis under Section 8(e), collateral issues arising under the NLRA do not remove antitrust actions from the jurisdiction of the federal courts, and the antitrust allegations of the second complaint would not be preempted by the Act.[19]

II. Bill Johnson's Analysis

In Bill Johnson's, supra, the Court recognized that an employer lawsuit against employees is a "powerful instrument of coercion and retaliation."[20] However, the Court held that the First Amendment insulated the filing and prosecution of a reasonably based lawsuit from being enjoined as an unfair labor practice, even if the lawsuit was motivated by an intent to retaliate against employees for exercising their rights under the Act.[21] On the other hand, no such considerations protect a lawsuit that lacks a reasonable basis, and the prosecution of such a suit is, if improperly motivated, an unfair labor practice that may be enjoined by the Board.[22]

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[19] See Connell Co. v. Plumbers & Steamfitters, 421 U.S. 616, 626 (1975), where the Supreme Court rejected the union's argument that its contract was allowed by the construction-industry proviso to Section 8(e) and that antitrust policy must defer to the NLRA. The Court reiterated its holding that "federal courts may decide labor law questions that emerge as collateral issues in suits brought under independent federal remedies, including the antitrust laws."

[20] 461 U.S. at 740.

[21] 46l U.S. at 740-44. See also Phoenix Newspapers, Inc., 294 NLRB 47 (1989).

[22] 461 U.S. at 740-744. See also Vanguard Tours, 300 NLRB 250, 254-56 (1990) (application of Bill Johnson's where state court lawsuit is no longer pending, but was withdrawn without adjudication on the merits); Summitville Tiles, 300 NLRB 64, 65-66 (1990) (where state court suit dismissed for lack of merit, the Board must still consider whether suit was filed for retaliatory purpose).

As to baselessness, the Board is not permitted to usurp the traditional fact-finding function of the trial court and may not proceed with a charge if a lawsuit raises genuine issues of material fact, but should stay the unfair labor practice proceedings until the judicial action has been concluded. [23] The Court also suggested that, in determining whether a suit has a reasonable basis, the Board may draw guidance from the standards used in ruling on motions for summary judgment and directed verdicts, although the Board is not bound by such standards. [24] The burden, however, is on the state-court plaintiff "to present the Board with evidence that shows his lawsuit raises genuine issues of material fact."[25] This burden, at least in the absence of an actual motion for summary judgment, requires the plaintiff to affirmatively establish that factual issues exist as to every prima facie element of its cause of action.

The Board has held that evidence of retaliatory motive underlying a lawsuit which attacks Section 7 activity consists of such factors as the baselessness of a lawsuit, [26] a request for damages in excess of mere compensatory damages, [27] and prior animus towards the defendant in the lawsuit. [28]

We conclude that it is unclear whether the Employer's lawsuits were baseless and filed for retaliatory purposes under Bill Johnson's. As to baselessness, the Region would have to examine whether there is any evidence to support the RICO claim that the Unions attempted to secure hot cargo agreements which

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[23] Bill Johnson's Restaurants, supra at 745-746.

[24] Id. at 745 fn. 11. Although a 12(b)(6) motion for dismissal is based solely on the plaintiff's pleadings, we note that it is the functional equivalent of a motion for summary judgment as they both serve the same purpose and achieve the same result. In both instances, the court presumes the facts alleged to be true and draws every reasonable inference from the allegations in the plaintiff's favor. See generally, Blum v. Morgan Guar. Trust Co., 709 F.2d 1463 (11th Cir. 1983); NL Industries, Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986); Halet v. Wend Invest. Co., 672 F.2d 1305, 1309 (9th Cir. 1982).

[25] 461 U.S. at 745-746 and fn. 12.

[26] Phoenix Newspapers, Inc., 294 NLRB at 49.

[27] Id.; H.W. Barss, 296 NLRB 1286, 1287 (1989).

[28] Machinists Lodge 91 (United Technologies), 298 NLRB 325, 326 (1990).

were not protected under the 8(e) proviso; whether the funding of BIDS through the contractual checkoff of the dues of Union members can, as a legal matter, violate 29 U.S.C. Section 186; whether there is any merit to the Employer's contention that it pleaded its antitrust causes of action with sufficient specificity; etc. As to retaliatory motive, the Region would have to assess whether the request for damages in either of the complaints was in excess of compensatory damages; whether there is evidence of animus towards the Unions; or the baselessness of the lawsuit.

However, we conclude that further proceedings are not warranted. Thus, we note that the District Court dismissed all counts of the lawsuit and that in the current appeal from the district court's decisions, all of the Employer's substantive allegations against the Unions will be resolved by the Ninth Circuit.[29] Additionally, assuming that the alleged hot cargo agreements which were sought would be protected by the 8(e) proviso, it would be too attenuated to argue that this provides a basis for finding that the suit is in retaliation of employees' Section 7 activity. In this regard, the lawsuit is violative of Section 8(a)(1) only if the one arguably preempted cause of action seeks to interfere with Section 7 activity (Loehmann's, supra), and only if the remaining causes of action were maintained in retaliation for the exercise of Section 7 activity under Bill Johnson's. Accordingly, under all the circumstances of this case, we conclude that the instant charge should be dismissed, absent withdrawal.

R.E.A.

ROF(s) - 2
x:petro2.[redacted]

[29] We recognize that if the lawsuit is violative of Section 8(a)(1), the Unions would be entitled to the litigation expenses and fees incurred in defending the lawsuit. See Teamsters Local 776 (Rite Aid Corp.), 305 NLRB No. 114, slip op. at 4, fn. 10 (December 11, 1991).

United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: May 14, 1996

TO : Robert H. Miller, Regional Director
Region 20

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Petrochem Insulation, Inc
Case 20-CA-24071

Bill Johnson's Chron
133-1200
133-7200
133-9300
506-1070
506-2001-5000
506-6090-8000
512-5009-6733
512-5009-6767

This Bill Johnson's[1] case was submitted for advice as to whether the Region should now issue complaint on a Section 8(a)(1) charge that had been held in abeyance, where the Employer's RICO and Sherman Act lawsuit against the Union has finally been resolved against the Employer.

FACTS

The pertinent facts as to the judicial proceedings herein in the United States District Court are set forth in our November 27, 1992 Advice Memorandum.

On July 23, 1993, the Office of Appeals concluded that the Region should hold the instant charge in abeyance, pending final resolution by the courts. On September 24, 1993, the Ninth Circuit sustained the Rule 12(b)(6) dismissal of the Employer's lawsuit against the Union in an unpublished opinion.[2] The court held that the Employer's Sherman 1 antitrust allegations[3] were fatally

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[1] Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731 (1983).

[2] 8 F.3d 29, 146 LRRM 2160.

[3] "Every contract, combination... or conspiracy in restraint of trade or commerce... is declared to be illegal." 15 U.S.C. Sec. 1.

defective because: they alleged merely an injury to a competitor and not the requisite injury to competition; and where environmental commenting is involved, a plaintiff must allege with particularity the actions which demonstrate an anticompetitive intent, and the Employer had failed to do so.[4] As to the Sherman 2 allegations,[5] the complaint was defective for failure to allege that the Union possessed monopoly power in a relevant market. As to the RICO allegations, the allegations were defective because the Employer had failed (1) to allege extortion in its amended complaint, and (2) successfully to allege a violation of Section 302 as a requisite predicate act.

The Employer filed a certiori petition which, on March 21, 1994, the Supreme Court denied.

ACTION

We concluded that the Employer violated Section 8(a)(1) by filing its lawsuits against the Union and its locals, since the Union's environmental activities were lawful activities protected by Section 7; the Employer's original complaint against the Union was preempted, the first and second amended complaint lacked a reasonable basis, and that the entire complaint had a retaliatory motive.[6] As a remedy, the Region should seek reimbursement of the Union's litigation expenses and fees.[7]

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[4] The court said that the requirement is an accommodation of the First Amendment Noerr-Pennington doctrine, which protects individuals who petition the government, and antitrust law.

[5] "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons , to monopolize... trade or commerce... shall be guilty of a felony...." 15 U.S.C. Sec. 2.

[6] The Bill Johnson's analysis is set forth in the original memorandum herein, pp.4-5.

The Union's involvement in the public environmental and land use permit hearings constituted protected Section 7 activities. As the Ninth Circuit observed in USS-Posco v. Trades Council,[8] "encouraging the use of unionized labor is an objective well within the legitimate interests of labor unions...." Here, the Union has engaged in activities for the mutual aid and protection of statutory employees, namely those engaged in plumbing and pipefitting work and employed by Union signatories.[9] Although the activities herein were not organizational, the Board has long recognized that an analogous activity, area standards picketing, which also amounts to a protest against work by nonunion employees, is protected activity.[10] Further, the Union did not engage in any misconduct as might cause it to lose the protection of the Act because the Employer has not shown that any of environmental activities were sham.

The district court found the Employer's original complaint to have been preempted; and that decision was not appealed. Thus, the original complaint was preempted, and that preemption relates back to the filing of the complaint. Preemption is jurisdictional,[11] and the court's finding that the complaint was preempted was

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[7] Operating Engineers Local 520 (Alberici Construction), 309 NLRB 1199, 1200 (1992).

[8] 31 F.3d 800, 809 (1994) (citing, inter alia, United Mine Workers v. Pennington, 381 U.S. 657,666.

[9] See Eastex, Inc. NLRB, 437 U.S. 556, 88 LRRM 2717 (1978), where the phrase "mutual aid and protection" is given a broad meaning.

[10] Giant Food Markets, Inc., 241 NLRB 727, 728 (1979), reversed and remanded on another issue, 633 F.2d 18, 105 LRRM 2916 (6th Cir. 1980), where the court agreed, 105 LRRM at p. 2919, that it was beyond dispute that area standards picketing of an employer which did not pay area standards was protected activity.

[11] International Longshoremen's Assn. v. Davis, 476 U.S. 380, 122 LRRM 2369, 2374-2376 (1986).

tantamount to a finding that it never had jurisdiction over the case.

Further, the first and second amended complaints were baseless. The district court refused to grant the Employer's leave to file its first amended complaint, and the Ninth Circuit affirmed the district court's dismissal of the second amended complaint for failure to state a cause of action.

Finally, the entire lawsuit was "retaliatory" within the meaning of Bill Johnson's, for the following reasons. The Board has held that evidence of retaliatory motive underlying a lawsuit which attacks Section 7 activity consists of such factors as the baselessness of a lawsuit[12] and a request for damages in excess of mere compensatory damages.[13] Here, the lawsuit sought to stop the union from engaging in protected Section 7 activities on behalf of the employees who worked for Union signatories. Further, the Employer's lawsuit sought injunctive relief and triple damages. In addition, the suit was "retaliatory" because it was in part preempted and was in part baseless.

B.J.K.

Attachment-1

ROF(s) - 0
x:pchem071.(b)(6), (b)(7)

[12] Phoenix Newspapers, Inc., 294 NLRB at 49.

[13] Id.; H.W. Barss, 296 NLRB 1286, 1287 (1989).

Petrochem Insulation, Inc. *and* Northern Nevada Pipe Trades Council No. 51, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO, Thomas J. Hunter, and Locals 62, 159, 228, 246, 342, 343, 350, 365, 393, 437, 444, 447, 460, 467, 471, 483, 492, 503, and 662 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO. Case 20–CA–24071

November 19, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND LIEBMAN

The General Counsel of the National Labor Relations Board filed a complaint and an amended complaint on May 31 and June 25, 1996, respectively, alleging that the Respondent violated Section 8(a)(1) of the Act. The Respondent filed answers admitting in part and denying in part the allegations of the complaints and raising certain affirmative defenses.

On October 9, 1996, the General Counsel filed a Motion for Summary Judgment and brief in support, with exhibits attached. The General Counsel submits that the Respondent's answers raise no bona fide issues of fact requiring a hearing. On November 29, 1996, the Respondent filed an opposition to the motion and a Cross-Motion for Summary Judgment in its favor, with exhibits attached. The General Counsel filed a response to the Respondent's Cross-Motion for Summary Judgment and reply brief. The Charging Parties filed a reply brief in support of the General Counsel and in opposition to the Respondent's Cross-Motion for Summary Judgment, and the Respondent filed a brief in reply to the General Counsel and Charging Parties.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motions for Summary Judgment

The principal issue in this case is whether the Respondent violated Section 8(a)(1) by filing and maintaining a civil lawsuit against the Charging Party Unions in Federal district court. The General Counsel and the Unions contend that the Respondent's suit lacked merit because it was dismissed by the District Court with prejudice, and the order was upheld on appeal. The General Counsel and the Unions further argue that the Respondent brought this suit against the Unions in retaliation for their having engaged in activities protected by Section 7 of the Act. Because the suit lacked merit and was filed for retaliatory purposes, the General Counsel and the Union urge that, under *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983), the Board should find that it was unlawfully filed and maintained, and should require the Respondent to reimburse the Unions for attorneys' fees incurred as a result of the suit.

The Respondent contends that its suit was lawful because, in its view, (1) the Union's actions that were the subject of the suit were not protected by Section 7; (2) the suit had a reasonable basis in fact and law; and (3) the suit was not filed with a retaliatory motive. The Respondent also contends that even if it violated the Act the Board should not require it to pay the Unions' attorneys' fees.

On the basis of the Respondent's admission of relevant allegations in the complaints, as well as other factual admissions made in its briefs, we find that there are no material issues of fact warranting a hearing and that as a matter of law the Respondent has violated Section 8(a)(1) as alleged. Accordingly, we grant the General Counsel's Motion for Summary Judgment and deny the Respondent's cross-motion.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Petrochem Insulation, Inc., a California corporation with an office and place of business in Vallejo, California, is a mechanical insulation contractor specializing in power plant and industrial construction. During the 12-month period ending June 20, 1991, the Respondent purchased and received at its Vallejo, California facility goods valued in excess of $50,000 directly from points outside the State of California. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that each of the Unions is a labor organization within the meaning of Section 2(5) of the Act.[2]

II. ALLEGED UNFAIR LABOR PRACTICES

A. Facts

The Respondent is a nonunion construction firm that performs construction and maintenance work for power plants and other industrial entities in the northern California area. The Respondent claims that beginning in 1988, the Unions commenced a campaign to cause its "clients" and potential clients to hire only unionized contractors to perform work for them and "to [decline] to allow Petrochem to bid for or perform certain projects for them because Petrochem was not a signatory to a

[1] The Respondent filed a motion to strike the Charging Parties' reply brief on grounds that a 13-page affidavit attached to the brief is "nothing more than legal argument," which extends beyond the 50-page limitation established by the Board. The Charging Party filed an opposition to the Respondent's motion. The matters set forth in the affidavit were not considered in deciding the issues presented here and, therefore, we find it unnecessary to pass on the Respondent's motion.

[2] District Council No. 51 was dissolved effective December 31, 1995.

union collective-bargaining agreement." According to the complaints filed by the Respondent in Federal court, the Unions' campaign consisted of filing, and threatening to file, environmental impact objections to projects on which the Respondent was a contractor, intervening in state permit proceedings and objecting to the issuance of permits "in order to delay and frustrate developers" of those projects, and petitioning "relevant administrative bodies, and ultimately the courts, with a large number of objections" regarding air quality permits.

On December 20, 1990, the Respondent filed suit in the U.S. District Court for the Northern District of California alleging that the Union's conduct constituted a conspiracy to "extort developers of [certain large energy-production facilities] to enter into and adhere to unlawful hot cargo and union project agreements" in violation of the Racketeering Influence and Corrupt Organization Act (RICO).[3] The complaint included a demand for treble damages. The district court granted the Unions' motion to dismiss the complaint, finding that the RICO claims were preempted by the Act.[4]

The Respondent then requested leave to file an amended complaint which realleged the above-described conduct, this time claiming that the Unions violated the Sherman Antitrust Act,[5] in addition to RICO. The district court found the first amended complaint facially inadequate and denied leave to file it. However, the Respondent was permitted to file a second amended complaint to allege an antitrust claim, provided that the amended complaint was factually explicit as to the following:

> (a) The specific identity of, and each party to, each contract, combination, or conspiracy in restraint of trade to which a non-labor group was allegedly a member.
>
> (b) The acts each defendant performed or undertook in furtherance of each contract, combination or conspiracy.
>
> (c) The injury to competition that resulted from each alleged contract.
>
> (d) The geographic and product market allegedly monopolized by any defendant, and the acts each named defendant undertook to pursue monopolization of that market.

Thereafter, the Respondent filed a second amended complaint alleging Sherman Act violations. The Respondent alleged that the Union violated section 1 of the Sherman Act by conspiring to restrain trade by entering into hot cargo agreements with energy project developers that precluded the Respondent from bidding on the developers' construction projects. The Respondents also alleged that the Unions restrained trade in violation of section 2 of the Sherman Act by filing "sham" petitions and meritless environmental objections to monopolize the relevant market.

The district court dismissed with prejudice the Respondent's second amended complaint.[6] In dismissing the section 1 antitrust claim, the court found that the Respondent "still fails to state a cognizable claim for two independent reasons, each of which has previously been explained to plaintiff, and each of which plaintiff has failed to cure."[7] Specifically, the court found that the Respondent (1) failed to identify the parties to and contents of any alleged contract in restraint of trade and (2) failed to plead the injury to competition that resulted from each alleged contract.

The court dismissed the Respondent's antitrust claim premised on section 2 of the Sherman Act because it failed to identify the contractors who supposedly combined with the Unions to monopolize the Respondent's market through sham petitioning, and because the complaint failed to allege that the Unions "have threatened or pursued a single meritless objection to any construction project, much less identify that objection or allege why such an objection should be considered meritless."[8] On appeal, the U.S. Court of Appeals for the Ninth Circuit affirmed the district court's dismissal of the Respondent's complaint with prejudice.[9] Following the Supreme Court's denial of the Respondent's petition for writ of certiorari,[10] the General Counsel filed the instant complaint.

B. Discussion

The complaint alleges that the Respondent violated Section 8(a)(1) by bringing a meritless suit against the Unions to enjoin them from engaging in protected concerted activity and to recover damages from them. The Board recently considered the same allegation in similar circumstances in *BE & K Construction Co.*, 329 NLRB 717 (1999). In *BE & K*, the Board determined that disposition of this issue is governed by legal principles set forth by the Supreme Court in *Bill Johnson's.* The Court in *Bill Johnson's* held that establishing a lack of reasonable basis in fact or law and a retaliatory motive are prerequisites to the Board's *enjoining* prosecution of a pending lawsuit. The standard is different, however, if the lawsuit has resulted in a final judgment adverse to the plaintiff. Under those circumstances, the Court held that the Board may proceed to consider whether the adjudicated lawsuit was filed with retaliatory intent, and if such

[3] 18 U.S.C. § 1962, et al.
[4] *Petrochem Insulation, Inc. v. Northern California Pipe Trades Council*, 137 LRRM 2194 (N.D.Cal. 1991).
[5] 15 U.S.C. §§ 1 and 2.
[6] 139 LRRM 2956 (N.D.Cal. 1992).
[7] 139 LRRM at 2961.
[8] 139 LRRM at 2965.
[9] 8 F.3d 29 (1993).
[10] 510 U.S. 1191 (1994).

intent is present, find a violation of the Act and order appropriate relief.

As discussed above, the district court dismissed the Respondent's lawsuit including the allegation that the Unions' governmental petitioning activity constituted antitrust violations, and the Ninth Circuit affirmed the result. Accordingly, the Respondent's suit lacked merit within the meaning of *Bill Johnson's*.[11] We therefore consider whether the suit was filed with an intent to retaliate against the Unions for engaging in protected activity.

As an initial matter, we must determine whether the Unions' actions were protected from retaliation by Section 7 of the Act. See *Braun Electric Co.,* 324 NLRB 1, 3 (1997). The Respondent makes two general contentions that they were not. It argues that the conduct in question was engaged in *by the Unions* and therefore did not involve retaliation against *employee* protected activity. It also contends that, because the Unions did not represent the Respondent's employees, the Act does not protect their actions from a retaliatory lawsuit. The Board addressed identical contentions with respect to the unions' activity in *BE & K*, 329 NLRB at 719. For the reasons fully set forth there, we find no merit in the Respondent's contentions.

The Unions' actual conduct at issue here was clearly protected. Their stated objective, set forth in an internal union report entitled "Participation in the Permit Process," was to intervene before state environmental and other regulatory permit proceedings incident to construction projects in northern California in order to "force construction companies to pay their employees a living wage, including health and other benefits."[12] This is a form of area-standards activity which is undisputedly protected under Section 7. *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180 (1978) (area-standards picketing).[13] As the Board explained in *Giant Food Markets*, 241 NLRB 727, 728 (1979), the rationale for protecting such activity is that a union has a legitimate interest in "protect[ing] the employment standards it has successfully negotiated . . . from the unfair competitive advantage that would be enjoyed by an employer whose labor cost package was less than those of employers subjected to the area contract standards."[14] The Unions' governmental petitioning activity here, which sought to force the Respondent and other nonunion construction companies to pay their employees union-scale wages and benefits, was clearly in furtherance of an area-standards objective of protecting the economic terms of employment enjoyed by the employees they represented. If successful, such efforts would not only expand union job opportunities for current union members but also would improve their ability to bargain for higher wages by mitigating employer resistance based on concerns about being undercut by nonunion competitors.[15] Further, by seeking to ensure that the Respondent or any successful construction project bidder address the environmental considerations with respect to toxic materials and pollution control—the Unions' other stated purpose for participating in the state permit proceedings—they acted in furtherance of the safety and health of all employees who would eventually be employed at a particular worksite, including potentially the employees the Unions represented as well as those of the Respondent. That clearly is concerted activity that falls within the "mutual aid or protection" language of Section 7. See *GHR Energy Corp.*, 294 NLRB 1011, 1014 (1989), enfd. 924 F.2d 1055 (5th Cir. 1991).

In its final argument on this issue, the Respondent contends that the Unions' conduct was not protected because it constituted a secondary boycott in violation of Section 8(b)(4)(ii)(B) of the Act. Specifically, the Respondent argues that the Unions participated in and threatened to participate in environmental permit proceedings with the unlawful secondary object of coercing project owners to cease doing business with the Respondent and other nonunion contractors. We disagree.[16]

The Supreme Court's holding in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building Trades Council*, 485 U.S. 568 (1988), precludes finding that the Unions' actions here violated Section 8(b)(4)(ii)(B) and, hence, were unprotected. In order to violate this statutory provision a union must engage in conduct "attended by

[11] For the reasons set forth in *BE & K*, supra, we reject the Respondent's argument that *Professional Real Estate Investors v. Columbia Pictures Industries*, 508 U.S. 49 (1993), altered the Supreme Court's approach to allegedly retaliatory lawsuits under Sec. 8(a)(1) as announced in *Bill Johnson's*.

[12] This report was attached as an exhibit to the Respondent's second amended complaint.

[13] See also *O'Neil's Markets v. NLRB*, 95 F.3d 733 (8th Cir. 1996) (area-standards handbilling).

[14] Although the court of appeals remanded the case to the Board, the court quoted this part of the Board's decision with approval. 633 F.2d 18, 23 fn. 11 (6th Cir. 1980).

[15] See *Electrical Workers IBEW Local 501 v. NLRB*, 756 F.2d 888, 894 (D.C. Cir. 1985); *NLRB v. Circle Bindery, Inc.*, 536 F.2d 447, 452 (1st Cir. 1976).

[16] Contrary to the General Counsel and the Unions, we find that the Respondent is not barred by Sec. 10(b) of the Act from contending that the Unions' conduct was unprotected. Sec. 10(b) provides that "no complaint shall issue based on any unfair labor practice occurring more than six months prior to the filing of the charge." That provision has been interpreted by the Board also to preclude raising, as a *defense* to a complaint allegation, conduct as to which Sec. 10(b) would bar a complaint if it were alleged as an unfair labor practice. See, e.g., *Sewell-Allen Big Star*, 294 NLRB 312, 313 (1989), enfd. mem. 943 F.2d 52 (6th Cir. 1991), cert. denied 504 U.S. 909 (1992). We find this principle inapplicable in the type of *Bill Johnson's* setting presented in this case where the General Counsel, as part of his burden in establishing a prima facie violation of Sec. 8(a)(1), must show that the Unions' alleged secondary activity, which occurred outside the 10(b) period, was protected. Because of this required showing, the Respondent cannot be precluded from asserting facts otherwise barred by Sec. 10(b) in countering the General Counsel's case.

threats, coercion or restraint."[17] In *DeBartolo*, the Supreme Court held that Section 8(b)(4)(ii)(B) does not cover peaceful handbilling because such activity, unlike picketing, accomplishes its goal by the persuasive force of the ideas it conveys, rather than by coercion, intimidation, or restraint. Id. at 580. The Court explained that handbilling, unlike picketing or striking, involves behavior solely of a speech-related nature and, therefore, to conclude that it is unlawfully coercive would pose "serious questions of the validity of Section 8(b)(4) under the First Amendment." Id. at 576. Accordingly, because the secondary activity in *DeBartolo* involved handbilling only, unaccompanied by violence, picketing, patrolling, or a strike, the Court concluded that the union's handbilling therein was not coercive in violation of Section 8(b)(4)(ii)(B).

Here, rather than handbilling, the Unions petitioned state governmental agencies in furtherance of what the Respondent contends was an illegal secondary object. We agree, however, with the Fifth Circuit in *Brown & Root, Inc. v. Louisiana State AFL*, 10 F.3d 316, 326 (1994), that governmental lobbying by a union "like handbilling, is activity protected by the First Amendment." Indeed, the right to petition a legislative body falls squarely under the "umbrella of 'political expression.'"[18] Accordingly, in order to avoid the potentially serious First Amendment problems that would result if the Unions' governmental petitioning were found to constitute "coercion" under Section 8(b)(4)(ii)(B), we shall follow *DeBartolo* and conclude that such conduct is lawful and, hence, protected by the Act.

In so holding, we find it unnecessary to decide whether the Unions' petitioning could be found to be coercive for 8(b)(4) purposes if, as the Respondent alleges, the Unions had filed, or threatened to file, "sham" petitions and meritless environmental objections with a secondary objective. As we have noted above, the Respondent alleged in its lawsuit that the Unions had violated section 2 of the Sherman Act by filing such petitions and objections. But the court dismissed that claim because it found that, despite its instruction to identify the Unions' actions that allegedly constituted monopolization, the Respondent had failed to allege that the Unions had "threatened or pursued a single meritless objection to any construction project, much less identify that objection or allege why such an objection should be considered meritless."[19] In view of its failure to identify in the court proceeding any example of the type of Union conduct that it contended then, and contends now, was unlawful, we infer that the Respondent was unable to produce any such evidence before the court and would be equally unable to do so before the Board. Because there is no support for the Respondent's contention that the Unions filed their petitions and objections without regard to their merits, we find that the Unions' conduct did not violate Section 8(b)(4)(B) and therefore did not lose its protected character.[20]

Having found, in light of the Federal court's dismissal of the Respondent's lawsuit, that the suit was meritless under *Bill Johnson's*, the remaining question in determining whether the lawsuit violated Section 8(a)(1) is whether it was filed for retaliatory reasons. Although we find no direct evidence in this regard, we note that "[m]otive or intent almost always must be inferred from circumstantial evidence."[21] Here, we infer a retaliatory motive behind the Respondent's lawsuit based on the following circumstantial evidence.

First, it is evident from the complaint allegations of the Respondent's lawsuit that it was filed in direct response to the Union's participation in the state environmental permit proceedings. As found above, that conduct was protected by Section 7 of the Act. Since the lawsuit was "aimed directly at [this] protected activity," and necessarily tended to discourage future Section 7 activity of this kind, it was, by definition, retaliatory within the meaning of *Bill Johnson's*.[22]

Our conclusion that the lawsuit was driven by retaliatory considerations can also be inferred from the treatment the Respondent's lawsuit received by the Federal court. As stated by the Court in *Bill Johnson's*, where an employer's suit is found without merit, "the Board would be warranted in taking that fact into account in determining whether the suit had been filed in retaliation for the exercise of the employees' [Sec.] 7 rights."[23] Doing so here, we note that the Respondent's lawsuit was found not just to have lacked merit—that would be a charitable characterization of its outcome. The lawsuit's claims did not even get to a jury pursuant to the Respondent's demand because it was unable to plead a legally cognizable cause of action, notwithstanding that the district court provided the Respondent three opportunities to do so. This degree of failure "undermines [the Respondent's] claim that it filed the suit to defend its legally protectable

[17] See *NLRB v. Servette, Inc.*, 377 U.S. 46, 54 (1964).

[18] *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 512–513 (1972).

[19] 139 LRRM at 2965.

[20] Because this is a summary judgment proceeding, we are required to evaluate the evidence in the light most favorable to the nonmoving party. In order to grant the General Counsel's motion and find the 8(a)(1) violation, then, we must view the facts in the light most favorable to the Respondent. That does not mean, however, that we have to accept as true, for the purposes of ruling on the General Counsel's motion, factual contentions raised by the Respondent that have already been rejected by the court.

[21] *Geske & Sons, Inc. v. NLRB*, 103 F.3d 1366, 1375 (7th Cir. 1997).

[22] *H. W. Barss*, 296 NLRB 1286, 1287 (1989); *Phoenix Newspapers*, 294 NLRB 47, 50 (1989); *BE & K Construction*, 329 NLRB at 721.

[23] 461 U.S. at 747.

interests"[24] and demonstrates instead its retaliatory purpose.

Finally, that the Respondent's suit was filed with a retaliatory motive can be inferred, in part, from the treble damages it sought from the outset as compensation for its alleged losses. The Respondent asserts that treble damages are statutory components of RICO and antitrust claims and, as such, cannot be evidence of motive. We disagree. It was the selection of the RICO and antitrust claims, with their provisions for treble damages, which underscores the Respondent's retaliatory intent. The Respondent had available a less drastic means of recovering its alleged losses; it could have filed suit in Federal district court under Section 303 of the Act to recover its *actual* damages by alleging as unlawful what it now argues was unprotected conduct, i.e., that the Unions' conduct violated Section 8(b)(4).[25] Instead, its RICO and antitrust claims constituted an attempt to obtain *three-times* its actual damages. In comparable circumstances where an employer has sought punitive damages in addition to alleged actual damages, the Board has inferred retaliatory intent.[26] We draw the same inference here.

CONCLUSION OF LAW

By filing and prosecuting a Federal court lawsuit against the Unions and their agents with causes of actions which were without legal merit and were motivated by an intent to retaliate against the Unions' protected concerted activity on behalf of its members and other employees, the Respondent has violated Section 8(a)(1) of the Act.

REMEDY

Having found that the Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act, we shall order that it cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act. We shall order the Respondent to reimburse the Unions for all legal and other expenses incurred in defending against the Respondent's lawsuit, plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987); and *Teamsters Local 776 (Rite Aid Corp.)*, 305 NLRB 832, 835–836 and fn. 10 (1991), enfd. 973 F.2d 230 (3d Cir. 1992), cert. denied 507 U.S. 959 (1993).[27]

ORDER

The National Labor Relations Board orders that the Respondent, Petrochem Insulation, Inc., Vallejo, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Filing and prosecuting lawsuits with causes of actions against the Unions that are without legal merit and are motivated to retaliate against activity protected by Section 7 of the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Reimburse the Unions for all legal and other expenses incurred in the defense of the Respondent's lawsuit in the manner set forth in the remedy section.

(b) Within 14 days after service by the Region, post at its facility in Vallejo, California, copies of the attached notice marked "Appendix."[28] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are cus-

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[24] *Diamond Walnut Growers v. NLRB*, 53 F.3d 1050, 1090 (9th 1995).

[25] See *Longshoremen & Warehousemen v. Juneau Spruce Corp.*, 342 U.S. 237 (1952).

Sec. 303 provides that

> (a) It shall be unlawful, for the purpose of this section only, . . . for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 8(b)(4) of the . . . Act.
>
> (b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States . . . and shall recover the damages by him sustained and the cost of the suit.

[26] *Summitville Tiles, Inc.*, 300 NLRB 64, 66 (1990); *H. W. Barss*, 296 NLRB at 1287–1288.

Several courts of appeals have also viewed antitrust treble damages as punitive damages. See *Lyons v. Westinghouse Electric Corp.*, 222 F.2d 184, 189 (2d Cir. 1955) ("[T]wo thirds of the recovery is not remedial and inevitably presupposes a punitive purpose."); *Clark Oil Co. v. Phillips Petroleum Co.*, 148 F.2d 580, 582 (8th Cir. 1954); *Kline v. Coldwell Banker & Co.*, 508 F.2d 226, 235 (9th Cir. 1974).

[27] The Supreme Court in *Bill Johnson's* expressly authorized the Board to award attorneys' fees and other expenses to employees who had been sued in violation of Sec. 8(a)(1). 461 U.S. at 747. The Respondent, however, citing *Summit Valley Industries v. Carpenters Local 112*, 456 U.S. 717 (1982), contends that the Board has no authority under *Bill Johnson's* to order reimbursement to the Unions because it contravenes the "American Rule" which generally precludes the award of attorneys' fees in legal proceedings. Consistent with *Bill Johnson's*, we reject that contention. In so doing, we stress that an award of attorneys' fees is appropriate, not because the Respondent did not prevail in its district court litigation against the Unions, but because it was the Respondent's lawsuit itself that was unlawful. See *Service Employees SEIU Local 32B–32J v. NLRB*, 68 F.3d 490, 496 (D.C. Cir. 1995). See also *Geske & Sons*, 103 F.3d at 1378. Accordingly, the "American Rule" does not prevent us from awarding the Unions attorneys' fees.

As noted above in fn. 2, District Council No. 51 was dissolved in December 1995. The Respondent contends that the dissolution renders moot any remedy sought on behalf of that Union. In response, the General Counsel asserts that the District Council's rights and obligations, including its claim for reimbursement of attorneys' fees, were assumed by various Local affiliates pursuant to the terms of dissolution and that the remedy originally sought on behalf of District 51 is, therefore, not moot. This is a matter which we shall leave to the compliance stage.

[28] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

tomarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 20, 1990.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of responsible official on a form provided by the Region attesting to the steps that the Respondent had taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT file and prosecute lawsuits with causes of actions against the Unions that are without legal merit and are motivated to retaliate against activity protected by Section 7 of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL reimburse the Unions for all legal and other expenses incurred in the defense of our lawsuit, plus interest.

PETROCHEM INSULATION, INC.